

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

FARREN ST. GEORGE,

Plaintiff,

-vs-

PEXCO, LLC.,

Defendant.

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NO. CV-10-3076-LRS

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendant's Motion for Summary Judgment (ECF No. 12). This action arises out of the termination of Plaintiff St. George, who worked at Pexco, LLC for approximately 15 years, and was laid off during an economic downturn in July of 2009. Plaintiff's original Complaint alleges: (1)"Breach of Contract," because his "retaliatory discharge" violated "the seniority provision in the event of a layoff," (2)"Wrongful Discharge" in violation of public policy, based on Title VII and Washington's Law Against Discrimination (WLAD), (3)"State Based Retaliation" under RCW 49.60.210(1), and (4)"Retaliation" under Title VII. Defendants assert that plaintiff's claims are time-barred, not legally cognizable, or fail for lack of sufficient evidence and must be dismissed.

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1 **I. SUMMARY OF FACTS**

2       The following facts are undisputed, unless indicated otherwise.  
3 Pexco designs and fabricates extruded plastics products for use as  
4 components to manufacturers and end-users in the aerospace, retail,  
5 traffic safety, medical, lighting and fence industries. Pexco's Yakima,  
6 Washington plant employs over 190 people in multiple departments  
7 including Extrusion, Fabrication, Shipping & Receiving ("S&R"), Customer  
8 Service, Sales, Engineering, and Administrative support. Plaintiff  
9 began working for one of Pexco's predecessor entities in 1994. From  
10 about 2003 to 2009, he worked in S&R as a Materials Handler. His job  
11 duties primarily included pulling material from the plant's warehouse for  
12 Fabrication to use for customer orders, unloading material from trucks,  
13 conducting inventories of material, and occasionally taking parts to the  
14 painters.  
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16       Sometime prior to his July 2009 layoff, Plaintiff verbally  
17 complained to the Production Manager Wayne Crawford about Fabrication  
18 Supervisor Steve Jaussaud. Crawford maintains this conversation took  
19 place in late summer or early fall of 2008. Plaintiff maintains it took  
20 place in May 2009. Plaintiff did not work with or report to Crawford  
21 or the Fabrication Supervisor. However, Plaintiff decided to speak  
22 directly with Crawford because Jaussaud reported to Crawford.  
23 Plaintiff's primary complaint was that the Fabrication Supervisor had  
24 recently gone "behind his back" to tell his direct supervisor, Warehouse  
25 Supervisor Teresa Taylor, that Plaintiff was standing idle and not  
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1 working. Further, Plaintiff alleged Jaussaud had called him "Jerry  
2 fucking Maguire." At the end of the conversation, Plaintiff added that  
3 his step-daughter, a Pexco employee who directly reported to Jaussaud,  
4 had told Plaintiff that she felt harassed by comments Jaussaud had made  
5 to her.

6 In response, Crawford told Plaintiff he would investigate, and asked  
7 Plaintiff to encourage his step-daughter to report her complaints herself  
8 to the HR Manager or him. Plaintiff asked Crawford to not pass along his  
9 complaints to anyone-particularly to Plant Manager Martin Streich.  
10 Crawford spoke with Jaussaud about the complaints. Jaussaud admitted to  
11 making the "Jerry Maguire" comment. Jaussaud denied, however, making  
12 inappropriate comments to Plaintiff's step-daughter. Nevertheless,  
13 Crawford cautioned Jaussaud to remain professional in interacting with  
14 both Plaintiff and his step-daughter. Crawford followed up with  
15 Plaintiff shortly thereafter to let him know that he had spoken with  
16 Jaussaud and to restate that Plaintiff should feel free to bring issues  
17 to him at any time. Plaintiff thanked Crawford. Crawford did not share  
18 the substance or fact of Plaintiff's complaint with Streich, as  
19 Plaintiff requested. Crawford assumed that the issues had resolved,  
20 because he had no further reports from Plaintiff or his step-daughter.  
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22 Plaintiff's employment with Pexco was covered by a collective  
23 bargaining agreement (CBA) between his union, District Lodge 751 of the  
24 International Association of Machinists and Aerospace Workers (the  
25 "Union") and Pexco's Yakima plant. In 2008-2009, like most other  
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1 businesses, Pexco experienced an economic downturn. In July 2009, Pexco  
2 determined that it needed to reduce the size of its Yakima workforce by  
3 eight positions due to a 32% decrease in sales and a foreseeable dim  
4 forecast. Plant Manager Martin Streich, together with the Vice President  
5 of Sales and Chief Operating Officer of Pexco determined the departments  
6 to reduce and the number of positions to eliminate per department without  
7 input from Streich's subordinates. They decided to reduce S&R by one  
8 worker. Accordingly, Plaintiff was laid off along with seven others from  
9 different departments on July 28, 2009.

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11 On August 3, 2009, the Union filed a grievance on his behalf,  
12 claiming that his "skills and abilities were not properly evaluated"  
13 under Article 10 of the CBA.<sup>1</sup> Specifically, the grievance claimed that  
14 Plaintiff should have been given the Receiving Clerk position occupied  
15 by an employee with less seniority. In January 2010, Plaintiff filed a  
16 charge with the Equal Employment Opportunity Commission, which was  
17 dismissed. On September 10, 2010, Plaintiff filed the Complaint  
18 presently at issue.

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23 <sup>1</sup>Article 10, Section 5 of the CBA provided that, in the event of a  
24 layoff, Pexco would "first consider the skills, abilities, and experience  
25 necessary to staff the jobs remaining after the layoffs in the particular  
26 department affected." It also provided that if Pexco determined "that  
the skills and abilities of the employees under review are relatively  
equal," it would lay off employees "in reverse bargaining unit seniority  
order."

1 **II. ANALYSIS OF CLAIMS**

2 **A. Wrongful Discharge in Violation of Public Policy Tort Claim**

3 Plaintiff has withdrawn this claim. ECF. No. 21, at 2.

4 **B. Breach of Contract Claim**

5 Plaintiff has withdrawn this claim. ECF. No. 21, at 2.

6 **C. State and Title VII Retaliation Claims**

7 In his Complaint, Plaintiff claims that his layoff violated "public  
8 policy" recognized in RCW 49.60.210 and in 28 U.S.C. § 2000e-3.  
9 Defendants first argue that Washington's Supreme Court has never  
10 permitted a plaintiff to allege both a Washington's Law Against  
11 Discrimination ("WLAD") retaliation claim and a tort for wrongful  
12 discharge in violation of anti-retaliation policy. As noted above,  
13 Plaintiff has withdrawn his wrongful discharge tort claim.

14 1. WLAD Retaliation Claim.

15 Plaintiff contends that the May 2009 complaint he made regarding the  
16 alleged harassment of his step-daughter was a significant factor in his  
17 discharge. In support of this proposition, Plaintiff states that Plant  
18 Manager Martin Streich began to ignore him within a week of the initial  
19 complaint and this behavior allegedly continued on 6 or 7 additional  
20 occasions. Plaintiff further argues that the layoff notice, effective  
21 July 28, 2009, included the elimination of 5 extrusion operator  
22 positions and 1 position from Shipping and Receiving. ECF No. 21, at 13.  
23 Plaintiff states there were 5 positions in Shipping & Receiving, only 2  
24 of which were senior to him.<sup>2</sup> A person in one of the less senior

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26 <sup>2</sup>In July 2009, the Shipping & Receiving Department was comprised of:  
the Warehouse Supervisor, one Shipping Clerk, one Receiving Clerk, and  
three Materials Handlers. Plaintiff was a Materials Handler. ECF No.

1 positions, Shipping Clerk Kim Taylor, offered to leave so Plaintiff  
2 wouldn't have to be laid off. Pexco refused Kim Taylor's offer stating  
3 the training required for that position would be more than minimal.  
4 According to Plaintiff, when Ms. Taylor left in mid August, Pexco  
5 replaced her with someone with no prior experience and had to provide the  
6 training it allegedly wouldn't provide to Plaintiff. Plaintiff believes  
7 he would not have needed as much training in the Shipping Clerk position  
8 as the person selected. Plaintiff also states that, according to Ms.  
9 Taylor, Plaintiff could have been easily trained to do the Shipping Clerk  
10 job. Plaintiff also states that, according to former employee Dan Fulks,  
11 who did the Receiving Clerk job, training for Plaintiff would take about  
12 2 weeks. Plaintiff concludes all of these facts demonstrate Defendant  
13 Pexco's decision was not a legitimate business decision.

14 Plaintiff maintains his retaliation claims under Title VII and WLAD  
15 are not based upon violations of the CBA's seniority provisions. Rather,  
16 Plaintiff maintains his retaliation claims are based upon allegations  
17 that Pexco, through its employees, discriminated against him, including  
18 terminating his employment, after he complained to management about the  
19 sexual harassment his step-daughter allegedly faced from her supervisor,  
20 Steve Jaussaud. It is only in response to Pexco's claim of legitimate  
21 business reason that the CBA language is raised.

22 Defendant replies to Plaintiff's argument that laying off the least  
23 senior materials handler was an internal inconsistency because the  
24 Shipping Clerk Ms. Taylor offered to resign. Defendant argues that the  
25 layoff notice was for one position, not one employee. Further, Defendant

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15, at 7.

1 explains, it eliminated a materials handler position, which is not  
2 necessarily interchangeable with the S&R clerk position. Plaintiff's  
3 only proof that he was qualified to be a S&R clerk is his own self-  
4 serving personal testimony, which does not create a genuine issue of  
5 material fact. Finally, Defendant points out that it eliminated a  
6 materials handler position as it was the only one in S&R with redundancy<sup>3</sup>  
7 and Pexco selected the least senior Materials Handler, which was  
8 Plaintiff.

9 Defendant asserts that Plaintiff admits or fails to challenge key  
10 facts that demonstrate Pexco's legitimate, non-retaliatory reasons for  
11 his lay-off and that Pexco should be granted summary judgment. Defendant  
12 asserts Plaintiff's claims-no matter what he calls them-cannot be  
13 analyzed without considering the CBA provisions. Defendant argues  
14 Plaintiff's claims are preempted by §301 of the Labor Management  
15 Relations Act, 28 U.S.C. § 185(a), and are time-barred by the applicable  
16 6 month statute of limitations. Defendant contends that the proper  
17 method to address whether Pexco breached its obligations under Article  
18 10 is either through the CBA's grievance provisions or by bringing a  
19 timely § 301 claim. Although Plaintiff brought a grievance, Plaintiff  
20 has failed to exhaust the CBA's grievance procedures by going to  
21 arbitration; failed to allege that his Union breached its "duty of fair  
22 representation" in handling his grievance; and failed to bring a timely  
23 § 301 claim (breach of the CBA) within the National Labor Relations Act's  
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25 <sup>3</sup>Pexco decided to reduce the number of materials handlers by one  
26 position because it was the only S&R position with more than one  
employee. Plaintiff does not dispute he was the least senior materials  
handler. ECF No. 15, at 7.

1 6 month statute of limitations.

2 To assert a claim for wrongful termination in violation of public  
3 policy under Washington Law, a plaintiff must show: (1)the existence of  
4 a clear public policy ("clarity"), (2)that discouraging the conduct in  
5 which a plaintiff engaged would jeopardize the public policy  
6 ("jeopardy"), (3) that the public-policy-linked conduct caused the  
7 dismissal ("causation"), and (4)the defendant must not be able to offer  
8 an overriding justification for the dismissal ("the absence of  
9 justification"). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941  
10 (1996). To satisfy the jeopardy element, a plaintiff must "show that  
11 other means of promoting the public policy are inadequate," which is a  
12 question of law. *Korslund v. DynCorp. Tri-Cities Srvcs.*, 156 Wn.2d 168,  
13 181-82 (2005).

14 Here, Plaintiff does not dispute Pexco's business reasons for the  
15 July 2009 layoffs and its need to reduce the number of Yakima employees  
16 due to quantifiable declining sales, including eliminating a position in  
17 S&R. Plaintiff does not challenge Pexco's explanation that Supply Chain  
18 Manager Steve Cyr and Plant Manager Martin Streich selected a materials  
19 handler position for elimination because it was the only S&R position  
20 with redundancy. Plaintiff fails to provide any evidence that any of the  
21 decision makers for his lay-off (Steve Cyr or Martin Streich) knew of his  
22 earlier complaint.<sup>4</sup> The only challenge to a decision maker is his  
23 personal speculation that the Plant Manager must have known about  
24 his complaint because he (Streich) "avoided" talking to him (Plaintiff)

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26 <sup>4</sup>Defendant's witness states Plaintiff's complaint occurred in late  
summer or early fall of 2008; Plaintiff maintains his verbal complaint  
was made in May 2009.



1 "6 or 7" times.

2 Plaintiff does not dispute that his direct supervisor, Teresa  
3 Taylor, and his manager, Steve Cyr, honestly believed his computer  
4 skills were inadequate for either S&R clerk positions without training.  
5 Plaintiff admits the CBA governed the terms of his employment, and  
6 contained provisions describing Pexco's duties related to seniority,  
7 layoffs, and recall, and that he was concerned Pexco failed to follow the  
8 CBA for his layoff. Plaintiff admits his union communicated a full time  
9 reinstatement offer to him after he had his union file a grievance.<sup>5</sup> The  
10 Court finds these facts undermine Plaintiff's claim that his lay-off was  
11 directly linked to his complaint concerning his step-daughter, in which  
12 Plaintiff specifically asked Crawford to not pass along his grievance to  
13 anyone-particularly to Streich.

14 Moreover, and most importantly, Plaintiff's retaliation claims,  
15 regardless of how they are described, are substantially dependent on the  
16 CBA's terms, which raise issues regarding § 301 preemption and the  
17 statute of limitations. Plaintiff has specifically claimed Pexco  
18 violated the CBA's "seniority provisions" when it included him in the  
19 July 2009 layoff. Thus, the Court must interpret the CBA to see whether  
20 Defendants "legitimate" reason for Plaintiff's layoff rings true. It is  
21 well-settled that if the asserted cause of action involves a right  
22 conferred upon an employee because of a CBA, then the claim is preempted

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24 <sup>5</sup>Plaintiff contends he was entitled to a "call" from the Plant  
25 Manager extending the offer for a full-time extrusion operator position.  
26 award after that date. A plaintiff's unreasonable rejection of an  
unconditional offer of reinstatement to substantially comparable  
employment constitutes failure to mitigate, which ends the accrual of  
back pay. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 (1982).

1 by § 301 of the Labor Management Relations Act, 28 U.S.C. § 185(a)  
2 ("§301"). *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th  
3 Cir. 2001) (*en banc*). Plaintiff's claim invokes CBA rights.

4 It is unquestionable that an outright claim based on a right  
5 afforded by the CBA is preempted. *Allis-Chalmers Corp. v. Lueck*, 471  
6 U.S. 202, 220 (1985); *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 667  
7 (9th Cir. 1985). Because determination of Defendants' legitimate reasons  
8 for Plaintiff's layoff inevitably involve contract interpretation, the  
9 remaining claims should be dismissed for failure to utilize contract  
10 grievance procedure or dismissed as preempted by §301. Even assuming  
11 the retaliation claims were independent of the CBA or that its  
12 interpretation was not implicated, however, the Court finds Defendants  
13 are able to offer an overriding justification for the layoff based on  
14 undisputed facts of record.

15 2. Title VII Retaliation Claim.

16 In his Complaint, Plaintiff claims that his layoff also violated  
17 "public policy" recognized under federal law in 28 U.S.C. § 2000e-3. To  
18 state a retaliation claim, plaintiff must show (1) he engaged in a  
19 protected activity, such as the filing of a complaint alleging sexual  
20 harassment; (2) Pexco subjected him to an adverse employment action; and  
21 (3) a causal link between the protected activity and the adverse action.  
22 *Hardage v. CBS Broad Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005) (affirming  
23 dismissal of Title VII retaliation claim). Although plaintiff's  
24 complaint regarding his step-daughter was arguably a "protected  
25 activity," and his layoff was an "adverse employment action," Plaintiff  
26 lacks sufficient evidence to link his complaint to his inclusion in the

1 plant-wide layoff. Further, as discussed above, Plaintiff cannot  
2 demonstrate that his inclusion in the eight-person layoff was linked to  
3 his arguably protected activity or that Defendants legitimate reasons for  
4 his layoff were pretextual for unlawful retaliation. For the foregoing  
5 reasons stated above, in the WLAD Retaliation Claim section, the Court  
6 grants summary judgment on this claim as well.

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8 **IT IS ORDERED:**

9 1. Defendant's Motion for Summary Judgment on Plaintiff's claim  
10 of Wrongful Discharge in Violation of Public Policy is **GRANTED**. This  
11 claim is dismissed with prejudice.

12 3. Defendant's Motion for Summary Judgment on Plaintiff's claim for  
13 Breach of Contract is **GRANTED**. This claim is dismissed with prejudice.

14 4. Defendant's Motion for Summary Judgment on Plaintiff's claim for  
15 "State Based Retaliation" under RCW 49.60.210(1) is **GRANTED**.

16 5. Defendant's Motion for Summary Judgment on Plaintiff's claim for  
17 "Retaliation" under Title VII is **GRANTED**.

18 6. All claims are dismissed with prejudice.

19 The District Court Executive is directed to file this Order, enter  
20 judgment consistent with this order, provide copies to counsel, and CLOSE  
21 FILE.

22 **DATED** this 23<sup>rd</sup> day of November, 2011.  
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24 */s/ Lonny R. Suko*

25 \_\_\_\_\_  
LONNY R. SUKO  
26 UNITED STATES DISTRICT JUDGE